No. 515

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IN THE SUPREME COURT OF THE UNITED STATES

HORACE ESTOL WALKER . . . . . Petitioner,

versus

ARTHUR T. GALT, et al., ... Respondents.

PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review a decision of the Court of Appeals for the Fifth Circuit, filed November 17, 1948, affirming in part and reversing in part a final decree of the District Court for the Southern District of Florida entered March 4, 1948 (R-157).

OPINIONS BELOW

Opinions of the Court of Appeals, filed on November 17, 1948, and as modified on rehearing, are printed in the record at Pages 209 and 210.

BASIS OF JURISDICTION

Jurisdiction is invoked under Chapter 81 of Public Law 773 (Title 28 United States Code, Section 1254).

Petitioner contends that the judgment of the Court of Appeals denies to the petitioner the equal protection of the laws; that such decision has decided an important question of local law in a way probably in conflict with applicable local decisions, and that in rendering such decision, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such departure by the District Court for the Southern District of Florida as to call for an exercise of this Court's power of supervision.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

Petitioner acquired a tract of land in Broward County, Florida, from W. H. Meeks, who had purchased the land from respondent, a large land owner, at the solicitation of respondent's agent.

Respondent, upon learning of the conveyance of the land to petitioner, brought a complaint in the District Court for the Southern District of Florida, alleging that petitioner and Meeks had conspired to acquire the property and had fraudulently represented to respondent's agent that Meeks was the purchaser, knowing that respondent would not have sold the land to petitioner because of past differences between them and because of petitioner's unsavory reputation.

The District Court on a trial upon bill and answer entered a judgment decreeing cancellation of the conveyances and denying to petitioner any compensation for improvements to the locus, which were estimated (proof being refused) to have been between $25,000.00 and $35,000.00

QUESTIONS PRESENTED

DOES A VENDOR OF LAND HAVE A RIGHT AT THE COMMON LAW, WHICH OBTAINS IN FLORIDA, TO CANCEL A CONVEYANCE MADE BY HIM UPON THE GROUND THAT HE DID NOT KNOW THE IDENTITY OF THE TRUE PURCHASER, AND HAD HE SO KNOWN IT, HE WOULD NOT HAVE CONVEYED THE PROPERTY?

WHERE A COMPLAINT ALLEGES A FRAUDULENT CONSPIRACY BETWEEN THE PURCHASER OF LAND AND AN INTERMEDIARY TO ACQUIRE THE PROPERTY FOR THE PURCHASER TO WHOM THE OWNER WOULD NOT HAVE SOLD, WHICH FACT WAS PLAINLY PROVEN TO HAVE BEEN UNKNOWN TO THE INTERMEDIARY, AND WHERE IT APPEARED THAT THE INTERMEDIARY WAS SOLICITED TO BUY THE LAND BY AN AGENT OF THE OWNER AND THAT SUCH AGENT KNEW THAT THE INTERMEDIARY DID NOT HAVE FUNDS WITH WHICH TO BUY THE PROPERTY, AND WHERE IT FURTHER APPEARED THAT THE PROPERTY WAS CONVEYED WITH DEFINITE DEED RESTRICTIONS, SOME OF WHICH WERE ANTI-RACIAL AND WERE INSERTED AT THE INSTANCE OF THE SELLER, WAS THE COURT OF APPEALS WARRANTED IN

HOLDING THAT UNDER SUCH CIRCUMSTANCES THE DISTRICT COURT SHOULD HAVE DECREED CANCELLATION OF THE CONVEYANCES?

IS THE DOCTRINE OF JUS DISPONENDI EMPHASIZED RATHER THAN DESTROYED BY THE IMPOSITION OF DEED RESTRICTIONS AND THE DECISION IN **Hurd v. Dodge, 334 U. S. 24?**

REASONS WHY WRIT SHOULD BE GRANTED

1. The decision rendered by the Court of Appeals is contrary to **Lenman v. Jones,** 222 U. S. 1, 56 L. Ed. 89, 32 S. Ct. 18.

2. The record is unique and there is no comparable decision by any Court of Appeals. In fact, there is but one reported decision squarely in point: **Nicholson v. Peterson,** 18 Manitoba 106, where an opposite result was reached.

3. The opinion rendered is contrary to public policy, in that it encourages fraud and casts a cloud upon the stability of all conveyances. The decision opens the door to suits to cancel conveyances at the whim of the grantor in cases where the grantee reconveys to someone to whom the grantor might not have sold in the first instance.

4. The restrictions involved were not race restrictions and the Court of Appeals misconstrued and erroneously applied **Hurd v. Dodge, 334, U. S. 24,** and held that the Hurd case, coupled with the deed restrictions, emphasized rather than destroyed "the right of the vendor to choose his purchaser."

5. The decision of the Court of Appeals deprived the petitioner of the equal protection of the laws.

6. The decision of the Court of Appeals purports to settle an important question of a local law in a manner probably at variance with applicable decisions of the Supreme Court of Florida and with controlling principles of equity jurisprudence as administered by local courts.

WHEREFORE, it is respectfully submitted that this Petition for Certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINIONS BELOW

The opinions below have been referred to in the petition for writ of certiorari under this same caption.

JURISDICTION

The statement as to jurisdiction has been set forth in the petition.

STATEMENT OF THE CASE

Petitioner purchased a tract of land generally known as the Administration Building and located in Broward County, Florida, from W. H. Meeks, who had purchased the land from respondent, a large land owner, at the solicitation of respondent's agent.

Respondent, upon learning of the conveyance of the land to petitioner, brought a complaint in the District Court of the Southern District of Florida, alleging that petitioner and Meeks had conspired to acquire the property and had fraudulently represented to respondent's agent that Meeks intended to use the property, knowing that respondent would not have sold the land to petitioner because of past differences and petitioner's alleged (but unproven) unsavory reputation.

The District Court entered a judgment decreeing cancellation of the conveyances and denying to petitioner any

compensation for improvements to the locus, which were estimated (proof being refused) to have been between $25,000.00 and $35,000.00.

THE TESTIMONY

In the summer of 1946, respondent's agent, Hoskins, without solicitation from Meeks offered to him Galt's Administration Building (a few miles north of Fort Lauderdale) for $25,000.00. Meeks was a clerk in the local tax collector's office. He did not have $25,000.00. He told Hoskins this and told him that he would have to get the money from friends or relatives. At the beginning, however, Meeks made no comment about Hoskins' offer. Hoskins urged, as a reason why Meeks should buy the building, that it could be fixed up as a high-class place with a restaurant and bar and that if this were done and the surroundings beautified lots of money could be made out of it.

A few days later Meeks communicated this information to Walker. Walker said that "he did not think much of it," but in a few days he asked Meeks to buy the property for him.

Pending the closing of the deal, a saloon keeper offered to buy the property at an advance in price of $10,000.00. Hoskins informed Meeks that he could make this profit on the resale.

These points are mentioned because the gravamen of the suit in part was that Walker had deprived Galt of his jus disponendi, that is, his right of disposing of the prop-

erty to some person of his choice. If Meeks had been allowed to have sold the property to an unidentified saloon keeper in Fort Lauderdale, it is absurd now to pretend that Galt on the sale to Walker was deprived of some fancied right to select the character and personality of the person who bought the land.

In any event, Galt executed and delivered a deed to Meeks, and, in turn, Meeks conveyed the property to Walker and wife who went in to possession.

Some time later Hoskins visited the property and saw Walker, who told him that he was the owner and intended operating a high-class restaurant on the premises. At this Hoskins said, "Well, that would be advisable because if Mr. Galt found out you were doing anything else, there would be trouble." (R-48).

Another ground that was supposed to confer equity on the bill was the allegation that the purchase of the property by Walker had had such a harmful effect upon the surrounding properties as to render them unsaleable. This was a substantial allegation in the complaint and if proven to have been true was one, which would have certainly strengthened the plaintiff's position. Certainly damage would have been far more substantial in such a situation than the supposed injury which Galt claimed to have sustained simply by someone interfering with a supposed right on his part to choose the person to whom he might sell the property. Such a right, we think, is illusory because in the absence of a restrictive covenant against alienation, the grantee would have had the right to have sold the property to anyone whom h chos to, and this without interfering with any rights of the grantor.

On the question as to the effect upon the saleability of the property, which Walker's purchase was alleged to have had, the defendant in the court below proved that several months after the institution of the suit Galt sold a piece of property directly across the road from Walker for a consideration of $10,000.00 (R-186). There is no evidence in the record that this purchaser was investigated by Galt or his agent, Hoskins, and for aught that appears to the contrary he may have been a hoodlum of the worst sort.

There was some evidence for the plaintiff that because of Walker's purchase property in the area was unsaleable, but such testimony is fragmentary and vestigial compared with the actual fact that a sale was made of land directly across the road from the parcel that Walker purchased.

SPECIFICATION OF ERROR

That the Court of Appeals erred in affirming the final decree of the District Court for the Southern District of Florida, insofar as said decree cancelled executed conveyances from the respondent to Meeks and from Meeks to the petitioner.

ARGUMENT

FIRST QUESTION

DOES A VENDOR OF LAND HAVE A RIGHT AT THE COMMON LAW WHICH, OBTAINS IN FLORIDA, TO CANCEL A CONVEYANCE MADE BY HIM UPON THE GROUND THAT HE DID NOT KNOW

THE IDENTITY OF THE TRUE PURCHASER, AND HAD HE SO KNOWN IT, HE WOULD NOT HAVE CONVEYED THE PROPERTY?

The Court of Appeals' answer to the above question was erroneous, wholly without authority and contrary to the opinion of this Court rendered in **Lenman v. Jones**, 222 U. S. 1, 56 L. Ed. 89, 32 S. Ct. 18. There an action was brought to compel specific performance of a contract for the sale of real estate. The contract was signed "Early & Lampton, agents for Fannie E. Wilhoite." Mrs. Wilhoite was but a "figurehead." The principal defense interposed was ignorance by the seller of the purchaser's identity. In affirming a decree for specific performance, Mr. Justice Holmes, who delivered the opinion of the Court, said:

> "* * * Even if it were true, as suggested, but not found or proved, that when the bargain with the defendant was made, the appellee, Jones, was behind the brokers, and a trust company of which he was president was behind him, and that the defendant was not informed of the facts, she could not complain. * * *"

55 **Am. Jur.** (Vendor and Purchaser) 572, Sec. 96, cites **Lenman v. Jones**, Supra as authority for the following statement:

> "* * * Unless misrepresentations in this regard are made by the ostensible purchaser, or he conceals the identity of his purchaser **when he knows that otherwise the vendor would not deal with him**, there is nothing of fraud in such practice, although it may be that the vendor would not have in fact made the sale

if he had known for whom the purchase was being made."*

The record conclusively shows that the case is squarely within **Lenman v. Jones,** supra for Meeks, respondent's principal witness, testified that he did not know that Galt would not sell to Walker. He said (R-80):

"Q. Didn't you know as a fact, Herman, that Mr. Galt or Mr. Hoskins would not have sold this property to you if they had even the least suspicion that you were negotiating for Walker?

"A. No, I don't know."

There is nothing to the contrary in this record.

The case at bar is infinitely stronger in favor of the purchaser than is **Lenman v. Jones,** as the Court was there dealing with the question of granting or withholding specific performance. In the instant case we are concerned with an executed conveyance.

Specific performance is a matter of grace, rather than of right, as is illustrated by the case of **Miller v. Fulmer,** 25 Pa. S. Ct. 106, wherein the Court said:

"* * * Specific performance, is not of right, but of grace. It does not necessarily follow that because a contract is binding at law, equity will enforce its performance. There are contracts which when executed equity will not rescind, but which while executory equity will not lend its hand to enforce." Graham v. Pancoast 30 Pa. 89; Henderson v. Hays 2 Watts, 148.

"* * * Whatever may be said in a court of law of the pretenses here employed, the conduct of the defendants was marked by a degree of guile sufficient to bar the interposition of equity in furtherance of their design. The case is one in which a Court of equity will not interfere either to rescind or enforce the contract, but will leave the parties to their remedies at law."

See also: 49 **Am. Jur.** (Specific Performance) 9 Sec. 4.

While there is no Florida decision squarely in point, analagous Florida decisions strongly indicate that the decision of the Court of Appeals is contrary to the law of Florida.

* Emphasis throughout is supplied unless the contrary is stated.

Florida is a common law state, which by statute adopted the common law of England as it existed on July 4, 1776 (Florida Statutes Annotated, Sec. 2.01). It requires no citation of authority to support the statement that except as modified by statute the common law of England is enforced in the British Dominion. The closest case in point decided by any court, so far as the writers' search could disclose, is that of **Nicholson v. Peterson,** 18 Manitoba 106, here an action was brought to set aside a transfer of land, on grounds similar to those stated here. Nicholson owned a tract of land on which there were no manufacturing establishments. Peterson acquired a nearby tract and erected a brass foundry. On two different occasions he refused to sell to Peterson. Peterson later heard through one Roger that Nicholson wanted to sell. Peterson engaged Roger to acquire the land. He opened negotiations with Nicholson and had three

interviews in connection with the purchase and used money furnished by Peterson to bind the agreement. Roger took a deed and the same day conveyed the lands to Peterson. In dismissing a bill to set aside the deed, the court said:

"* * * I find that the plaintiff would not have sold the land in question to the Petersons, because of the probability of their using it in connection with their foundry. I find that both Petersons and Rogers knew that the plaintiff would not so sell. I find that Roger represented to the plaintiff that he was buying the land for himself, for the purpose of building a dwelling house or houses upon it, and that he was not buying it for the Petersons and that he would prefer that the foundry was not there.

"I find that, from the first, Rogers' object in buying was to re-sell the property to Peterson Bros. and that he never intended to build a double or any other kind of a house upon the land. I find that, at the time of the first interview with the plaintiff, Roger was not in the employ of the Petersons, but I find that he repeated the representations after he was employed by them.

"I find that Petersons understood that Roger was to attempt to buy the land in his own name and conceal from the plaintiff the fact that he was buying for them and that they sanctioned him so doing. I find that the plaintiff was induced to sell to Roger by Roger's representation that he was going to build.***"

"It is not sufficient that the contract was induced by a false representation, it must have been as to a

material fact and damage must have resulted as the immediate and direct, and not as a remote, consequence of such representation: Bell v. Macklin, 15 S.C.R. 576.

"Was the representation here material, and did injury result to the plaintiff as the immediate consequence of it? Could the same result have followed if the statements made by Roger had been absolutely true?** It is quite clear that if the statements made by Roger had been true he would have been perfectly free to change his mind immediately after the sale and re-sell to the Petersons. I agree with Mr. Pitblado that the plaintiff's right cannot be higher than it would have been had Roger's statements been true. I cannot find, therefore, that the representations were material or that damage has resulted as the immediate and direct cause.

"The plaintiff's action in my opinion fails and must be dismissed. * * *"

In **Stackpole v. Hancock, et al.,** 40 Fla. 362, 24 So. 914, the Supreme Court of Florida said:

It has been decided in this state, in accordance with the prevailing rule, that statements amounting to an estimate or opinion of the value, condition, character, or adaptability to certain uses of real estate are not actionable unless the party resorts to some fraudulent means to prevent an examination of the property. Williams v. McFadden, 23 Fla. 143, 1 South. 618; Land Co. v. Studebaker, 37 Fla. 28, 19 South. 176.

In proceedings in chancery to cancel a deed to real estate on the grounds of fraud, the mere expression of an opinion as to value, **or a statement as to the uses for which the land is wanted, will not ordinarily suffice.**

In **International Realty Associates v. McAdoo**, 87 Fla. 1, 99 So. 117, involving an action to cancel a contract for the sale of land, the Supreme Court of Florida said:

"The power of a court of equity to enforce the cancellation of a contract, though well recognized in character and application, is very exceptional. Its purpose is to supplement the powers of the courts of law when there exists unusual equity of a settled and well-recognized kind.** The grounds on which equity intereferes for cancellation or rescission are distinctly marked, and every case proper for this branch of its jurisdiction is reductible to a particular head.

"These grounds are, primarily, fraud, mistake, turpitude of consideration, and circumstances entitling to relief on the principle of quia timet; and generally they do not include inadequacy of price, improvidence, surprise, or mere hardship.

The case of **Thompson v. Barry**, 184 Mass. 429, 68 N.E. 67, cited by the Court of Appeals, and every decision cited to the court below by the respondent presented factual situations either denying specific performance or involving misrepresentations as to use. Not a single case was cited by the respondent where cancellation was

decreed solely upon a claim of misrepresentation as to the identity of the purchaser. This court in **Lenman v. Jones,** supra, established as a matter of law that concealment of the identity of the purchaser was not ground for withholding specific performance, and if concealment of identity of the purchaser is not ground for a denial of specific performance, it certainly is not ground for cancellation of an executed conveyance.

The decision of the Court of Appeals is without judicial support, is contrary to **Lenman v. Jones,** supra, and against sound public policy.

SECOND QUESTION

WHERE A COMPLAINT ALLEGES A FRAUDULENT CONSPIRACY BETWEEN A PURCHASER OF LAND AND AN INTERMEDIARY TO ACQUIRE THE PROPERTY FOR THE PURCHASER TO WHOM THE OWNER WOULD NOT HAVE SOLD, WHICH FACT WAS PLAINLY PROVEN TO HAVE BEEN UNKNOWN TO THE INTERMEDIARY AND WHERE IT APPEARED THAT THE INTERMEDIARY WAS SOLICITED TO BUY THE LAND BY AN AGENT OF THE OWNER AND THAT SUCH AGENT KNEW THAT THE INTERMEDIARY DID NOT HAVE FUNDS WITH WHICH TO BUY THE PROPERTY, AND WHERE IT FURTHER APPEASED THAT THE PROPERTY WAS CONVEYED WITH DEFINITE DEED RESTRICTIONS SOME OF WHICH WERE ANTI-RACIAL AND WERE INSERTED AT THE INSTANCE OF THE SELLER, WAS THE COURT OF APPEALS WARRANTED IN

HOLDING THAT UNDER SUCH CIRCUMSTANCES THE DISTRICT COURT SHOULD HAVE DECREED CANCELLATION OF THE CONVEYANCES?

The bill of complaint alleges a fraudulent conspiracy between petitioner and Meeks, but the proof unequivocably shows that Meeks, knew of no animosity between petitioner and respondent and that he was ignorant of the fact that petitioner could not have bought directly from the respondent. (R-80). Furthermore, the record shows (R-85) that petitioner, himself, was hesitant about buying the property. The record reflects the following (R-85):

"Q. Subsequent to the first conversation you had in the post office (with respondent's agent), what did you do when he gave you that information? Did you do anything about it?

"A. In a few days I saw Walker.

"Q. The defendant?

"A. Yes. He told me, "I have sold my place down there," and I says, "If you want to buy the other one, he will take $25,000.00" When I told him that he didn't think much of it. He didn't say yes or no, whether he wanted it but in a few days he says, "Buy it for me." and I says all right."

In the face of the above uncontradicted and unchallenged statements, how could there have been a conspiracy to acquire the property, or a fraud perpetrated? The Court of Appeals on this record has set aside, executed conveyances on the unproven charge of fraud and a conspiracy.

The decision of the Court of Appeals is contrary to sound public policy and unsupported by authority. If allowed to stand, it will set a precedent that will open the door to actions by all vendors who seek, for reasons of profit or otherwise, to rescind an improvident sale. Under the decision a vendor need only state that he would not have sold had he known the identity of the ultimate purchaser.

THIRD QUESTION

IS THE DOCTRINE OF JUS DISPONENDI EMPHASIZED RATHER THAN DESTROYED BY THE IMPOSITION OF DEED RESTRICTIONS AND DECISION IN **HURD v. DODGE,** 334 U. S. 24?

There is no pretense or allegation that the use made by the petitioner was violative of the deed restrictions imposed by the vendors. The Court of Appeals took the position that the decision in **Hurd v. Dodge,** 334 U. S. 24, left the enforcement of race restrictions to the honor of the covenantors, and from that concluded:

> The right of the vendor to choose his purchaser is not destroyed but rather emphasized by these considerations."

The Court of Appeals then proceeded to read into the deed an additional restriction that the property could not be used by Horace Walker. We submit that the case of **Hurd v. Dodge,** supra, is limited to race restrictions and their unenforceability under the Federal Constitution. The doctrine of that case has absolutely nothing whatever to do with the case at bar, and the court erred in applying, to any degree, the Hurd decision.

We took the position in the Circuit Court of Appeals that the respondent, by imposing deed restrictions and retaining control of the "use and disposition" of the property, conclusively fixed and characterized as material only those conditions enumerated; or in other words, that only a violation of the enumerated restrictions was material to vendor. The respondent, himself, to protect the value of his remaining lands, had imposed four restrictions, which were designed to afford him the security that he considered necessary, and the court erred in reading into the deed a restriction against resale to petitioner. The decision in this respect is squarely contrary to the Law of Florida as laid down in **Volunteer Security Company, Inc., et al v. Dowl, et al.,** _____Fla._____33 So. (2d) 50, wherein the Supreme Court of Florida very recently held (Headnote 2):

> "Restrictive covenants not contained in muniments or records of documents, effecting title to lots, will not be enforced on grounds that they were intended by grantor of lot and should be implied."

CONCLUSION

The decision of the Court of Appeals is contrary to **Lenman vs. Jones,** supra, decided by this court. It is contrary to common law in force in the State of Florida, and **Volunteer Security Company, Inc., et al v. Dowl, et al.** supra and it is violative of sound public policy.

The writ of certiorari should be granted.

Respectfully submitted,

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